IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9843 of 2000

with

SPECIAL CIVIL APPLICATION No 7823 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : YES

5. Whether it is to be circulated to the Civil Judge? : NO

DEVENDRA JASHUBHAI RAVAL

Versus

AHMEDABAD MUNICIPAL CORPORATION

Appearance:

1. Special Civil Application No. 9843 of 2000
MR MIHIR H JOSHI for Petitioner
MR BHASKAR TANNA, SR. Counsel WITH
MR AMIT M PANCHAL for Respondent No. 1

2. Special Civil ApplicationNo 7823 of 2000
MR ASHOK K PADIA for Petitioner
MR BHASKAR TANNA, SR. Counsel WITH
MR AMIT M PANCHAL for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL

and

MR.JUSTICE C.K.BUCH

Date of decision: 13/12/2000

CAV JUDGEMENT

(Per : MR.JUSTICE C.K.BUCH)

1. Rule. Learned counsel Mr. Amit Panchal appears and waives service of Rule in both the petitions on behalf of the respondents.

2. These two writ petitions are moved under Article 226 of the Constitution of India by the petitioners of both the petition. The petitioner of Spl.C.A. No. 9843/2000 has prayed to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or directions declaring the action of the respondent Ahmedabad Municipal Corporation (hereinafter referred to as "AMC" or the "Corporation") of removing the permitted articles/structures from the area being No. 3/1 of Larri Stand No.3 in Final Plot No. 430 (Part) of Ellisbridge TP Scheme No.3 of the petitioner including paving, electrical installations, water connection and fixtures, as being illegal and unconstitutional and has also further prayed to restrain the respondent Corporation from obstructing the petitioner from carrying on business in acordance with the permissions and resolutions of the respondent in this behalf from time to time. So far as the petitioner of Spl.C.A. No.7823/2000 is concerned, it has been prayed to issue a writ of mandamus directing the respondents to implement the scheme (hereinafter referred to as the compromise formula") approved by this Court on 22.4.1987 and approved by the Supreme Court of India on 6.1.1988 as referred to in the said petition. It has been also prayed that a special body to implement the aforesaid compromise formula within existing administrative structure of the respondents and further prayed to restrain the respondents from removing the hawkers doing business through larries, gallas and pitches in hawking zones declared in the compromise formula.

3. Spl.C.A. No.7823 of 2000 is filed by Rajendrasinh Darshansingh Punjabi, General Secretary of Akhil Gujarat Lari Galla Patharnawala Shramik Samaj, representing the hawkers doing small business thorugh larries gallas and patharnas on the Road and streets in the city of Ahmedabad, praying for a writ of mandamus or like writ or diection directing the respondents to

implement the compromise formula approved by the Hon'ble High Court of Gujarat on 22.4.1987 and approved by the Hon'ble Supreme Court of India on 6.1.1988. The petitioner has further prayed to restrain the respodents from removing the hawkers doinig business through larries, gallas and pitches in hawking zones declared in the compromise zone.

4. At the time of admission hearing of both these petitions, learned counsel appearing for the parties jointly submitted that both these petitions should be heard finally and same can be disposed of on merits without entering into other procedural formalities. Hence, at the request of learned counsel appearing for the parties, we have heard both the petitions simultaneously on merits and in view of the contentions raised in the petitions and reliefs prayed, though the reliefs prayed appear to be of different nature,but in substance, the reliefs prayed for are similar in nature as issues involved in both these petitions are almost similar. The difference is of a degree and not of kind and there is no basic difference in the reliefs claimed and hence, we dispose of both these petitions by this common judgment on merits in limine.

5(i). The facts revealed in both the petitions are having some different shades. We would like to narrate facts in brief for the sake of convenience. The petitioner of Spl.C.A.9843/2000 is one of the allottees of Larri Stand No.3 situated near Law Garden in Final Plot No. 430 of T.P.Scheme No.3 of Ellisbridge. He has challenged legality of the action of the respondent Corporation of removing permitted articles and structures from his larri-stand No.3/1 allotted to him contending that this action of the respondent Corporation is illegal, harsh, excessive, without jurisdiction and without authority of law and is in breach of principles of natural justice. It is further contended that the action is unconstitutional and void and the same is in violation of Article 19(1)(g) of the Constitution of India.

(ii) It is contended that since 1956, area around Law Garden was permitted to be used for the purpose of vending eatables and on 20.10.1976, Standing Committee of the respondent Corporation passed Resolution No. 1706 proposing larri-stand adjacent to Law Garden which could accommodate 72 larriwalas. This resolution was modified on 18.10.1977 wherein it was resolved that a stripe of land admeasuring about 10 ft. in depth be carved out from garden area and the same may be used for the purpose

of constructing larri-stand. It was also decided that allottee of larri-stand would have facilities of light, water, drainage and paved level ground and 36 vendors were to be accommodated in that area. We have carefully perused the aforesaid resolutions produced before us in the context of other material available on record and the contentions raised by the respondent Corporation. The petitioner, on the day on which action was taken, was doing business of selling Icecream & Kulfi in the name and style of Sahajanand Icecream & Kulfi Centre and he is doing business on the said place since more than 20 years. Similarly, other 35 persons who were allotted area were also using the same for the purpose of their business and are paying sum of Rs.900/ per annum to the respondent Corporation on demand. The petitioner was also granted registration by Police Commissioner, Ahmedabad city for doing business in the area from 5.00 P.M. to 12.30 P.M. from 17.8.1979 and thereafter business period was extended from 12.30 P.M. to 2.00 A.M. during festival season and ceremonial days.

(iii) According to the petitioners, AMC recommended to put up permanent structure in view of the growing popularity in the area some where in the year 1982-83 and a resolution to that effect was also passed. In the year 1983, AMC imposed certain conditions and directed to take back respective larries after business hours which resulted into litigation and Spl.C.A No. 3513 of 1983 was filed and prohibitory interim order was prayed to the effect that AMC be directed not to enforce such condition. Thereafter, in view of the representation made on 8.8.1983, the said petition came to be withdrawn. Representation made by Larri Owners Association of the area was rejected in the month of March 1984. According to the petitioners, as the scheme for permanent stall was under contemplation, representation made on 8.8.1983 was rejected.

(iv) In the year 1991-92, AMC was again moved and it was submitted that larri owners may be provided facility of electric connection and ultimately, by a resolution dated 16.1.1992 bearing No. 1782 passed by the Standing Committee of AMC, it was resolved to grant No Objection Certificate (NOC) to the petitioners and other persons carrying on business in Law Garden area. It is contended that certain observations of the aforesaid resolution indicate that larri stand was a legal stand, had facilities of paving, water and drainage etc. Considering the fast development, AMC decided to issue NOC vide aforesaid resolution and petitioners have annexed said resolution at Annex.F to the petition. NOC

issued by AMC was conditional and as per one of the conditions of NOC, the petitioners submitted an undertaking for not claiming compensation in the format required by the AMC. It is averred that irrespective of the set of facts, somewhere in the year 1992-93, a demolition drive was initiated by AMC in view of large number of vendors beyond 36 in number initially allowed to carry on their business in the area.

(v) The petitioner and other allottees, on apprehension, filed a Civil Suit No. 168/93 before the City Civil Court and after hearing the parties, learned Judge, City Civil Court held that plaintiffs were running their business in accordance with law and there was no encroachment on road. However, the Court reserved liberty to AMC to demolish illegal construction after issuance of notice. Copy of the order passed below application exh.5 in the aforesaid civil suit is also available on record. The matter, earlier, was taken before the Apex Court. It is averred that the petitioner is not aware about any such earlier proceedings initiated before the Supreme Court of India in respect of the area which is subject matter of the petition. (Para-9 of the petition).

6.(i) The petitioner has mainly contended that irrespective of the set of facts as stated above, he carried on his business peacefully up to 5th August,2000, the day on which petitioner and other occupants in the subject area were served with notices from AMC and petitioner along with others was directed to remove illegal construction within 10 days from the date of receipt of the notice. Notice was issued pursuant to the order of this Court. Copy of the notice is produced at Annex.J. According to the petitioners, this notice indicates atleast one fact that the petitioner is carrying on business on Final Plot No. 430 (Part) and has been licenced to do so. It is contended that the notice was replied by the petitioner on 19.8.2000, contending inter alia, that the notice was without jurisdiction and prayed for affording personal hearing before taking any decision in the matter. Reply filed by the petitioner is available on record for our perusal at Annex.K. According to the petitioner, he & other persons voluntarily offered to pull down the structure alleged to be illegal, and on 12.9.2000, they voluntarily pulled down such construction. According to the petitioner, though this Court has not passed any order directing the AMC to demolish the existing structure of the petitioner and other persons carrying on business there and to evict them from the business premises, AMC high-handedly issued

notice and initiated action of demolishing the entire structure and evicted the petitioner along with other persons- allottees in the area. According to the petitioner, AMC has wholly misconstrued the directions of this Court and by using bulldozers and with the assistance of other machineries, removed all fixtures, fittings, electric connection, cables and also removed stalls in the entire area. It is averred that the petitioner requested the officers who were at the site as well as security personnels that they are holding valid licence to carry on business in the area and they have paid licence fees up to 31.3.2001 and therefore, they cannot be removed high-handedly. According to the petitioner, action of AMC is ex-facie illegal and irrational and which is something to pre-empt adjudication ignoring all relevant facts and is not permitting the petitioner and others to do their business in the area even as per the terms of licence (Parvana) granted to them. When AMC itself has allotted space on FP No. 430(Part) Ellisbridge TP Scheme No.3 adjacent to Law Garden and had given facility of paved flooring, water, drainage, electric connection etc. and when they were doing business since more than 20 years, they could not have been thrown out merely on the fact that some structure was found offending which was voluntarily pull down by the petitioner himself and other allottees and hence the action of AMC in demolishing entire existing structure including electric installation, paving etc. and evicting the petitioner and others from the place of business, is without jurisdiction and without authority of law. When AMC served the petitioner and others with a notice to remove only alleged offending structure and when petitioner and others have prayed for personal hearing, AMC cannot remove entire structure and evict the petitioner and others by simply abandoning the process of law and, therefore, the action of AMC is irrational and contrary to the provisions of the Act. According to the petitioner, principles of of natural justice have been violated and action, therefore, is clearly arbitrary and discriminatory. It is alleged by the petitioner that it is evident that merely some action is taken after orders of the High Court during the hearing of Public Interest Litigation (PIL), AMC has picked up the petitioner and other persons and permanent structures which were wholly illegal as indicated by the High Court, have remained untouched and structures of the petitioner and others have been removed. According to the petitioner, notice dated 5.8.2000 served on the petitioner and others stands complied with because the petitioner and other allottees themselves removed the alleged offending structure voluntarily and therefore the further action of AMC in

blocking the access in the area and issuing instructions to ensure that subject plot is paved over so that there can be no restoration of use, is wholly illegal and unjustifiable. On 20.9.2000, during the course of the hearing of the petition, the petitioner moved the draft amendment in view of the contentions raised by AMC and affidavit-in-reply filed on that very day. Draft amendment was allowed. The petitioners, by amending the petition, have challenged the legality and validity of the notice dated 31.12.1994 and submitted that irrespective of the fact of issuance of notice dated 31.12.1994, AMC is not entitled to justify the notification.

(ii) It is stated that inclusion of area around Law Garden in No Hawking Zone is irrational and unreasonable because the place has been used for the purpose of vending foodstuff and eatables since 1956 and vendors were not consulted before issuance of the notification. According to the petitioner, it is absolutely unreasonable to prohibit hawking near public garden since in fact both rolls absolutely in hand to hand and one is complement to another. According to the petitioner, before issuance of notification in the year 1994 and determining the factors enumerated in the scheme reflected in the notification, the Police Commissioner ought to have been consulted as regards the density of vehicular traffic and pedestrian traffic in the relevant area. According to the petitioner, final scheme as framed by the Municipal Commissioner on 9.4.1986, and as amended from time to time, is unconstitutional and the DP Road boundaries as per the Draft Revised Development Plan of 1997 is unconstitutional. Action of extension of Non Hawking Zone by AMC to the road, footpath and pavements around the public garden requires to be quashed and set aside more particularly around Law Garden. Along with the main prayer made in paras 27, 27-A & 27-AA of the petition, the petitioners have alternatively prayed that this Court should issue direction and clarification with regard to the implementation of Final Scheme and the order of the Court passed in Spl.C.A. 4269/82 and other cognate matters on 23.12.1985 as modified by the orders of this Court on 22.4.1987 and 8.12.1987. The petitioners have also prayed that AMC be restrained from obstructing the petitioner and other allottees from carrying on their business in accordance with the terms of resolution of AMC and as per the terms reflected in the licence granted to them.

7(i) Respondent AMC has resisted these petitions by filing affidavit-in-reply and has produced certain

documents in support of its say. During the course of hearing of the petition and after placement of draft amendment by the petitioner, AMC has filed further affidavit of the same officer namely Mr. N.M. Baleva, Estate Officer working in AMC. Corporation has tried to clarify the factual as well as legal position in both the affidavits and has submitted that action taken by the AMC is absolutely in accordance with law and authority. Before removal of the offending structures and evicting the petitioner along with other persons carrying on business of selling eatables in the area, has considered the terms on which licence was issued and action of cancelling licence and all consequential actions were initiated with a view to act legally and judiciously. The order passed by Ld. Judge, City Civil Court on 12.4.1994 points out that liberty was granted to AMC that if encroachment or illegal construction of the shed is found, AMC would be at liberty to issue notice in respect of such unauthorised construction and/or encroachment. Language of the order passed by learned City Civil Judge does not preclude AMC from taking action in accordance with law, especially as indicated in the first line of the notice issued by AMC in the month of August-2000.

(ii) It is not a matter of dispute that the petitioner did not comply with the requirements of the notice and had tried to render explanation. It is contended that when terms of licence have been accepted by the petitioner, he cannot challenge the same. As the petitioner has committed breach of more than one condition of the licence and has also simultaneously encroached upon the public street and has made unauthorised construction over the public street which was of permanent nature and was in clear infringement of the terms of licence as well as scheme framed by AMC on 9.4.1986, action taken by AMC is just, legal and proper. According to AMC, scheme framed by AMC was approved by the High Court of Gujarat vide its order dated 22.4.1997 and supplementary report of the Court dated 7.12.1997 and also by Hon'ble Supreme Court of India. It is contended that when scheme was approved and accepted, it would not be legal or otherwise possible to reopen or to re-examine the feasibility of the scheme. According to AMC, in view of observations made in the order dated 6.1.1988, re-examination of feasibility of the scheme is only possible if any extreme difficulty arises in implementation of the judgment of the High Court. It is contended that approval of the scheme by Supreme Court of India and directions issued pursuant thereto are binding to all concerned especially in light of Article 141 of the Constitution of India. It is specifically contended

that the petition is misconceived both on facts and law and should be dismissed in limine. The action taken by the Corporation is pursuant to the directions issued by this Court in exercise of its prerogative writ jurisdiction under Article 226 of the Constitution of India on 11.7.2000 (Coram : B.C.Patel & P.B.Majmudar, JJ). The direction is clear to the effect that the scheme prepared by the AMC pursuant to the order passed by Hon'ble Supreme Court of India while dealing with Special Leave to Appeal arising out of the orders passed by the High Court of Gujarat in Spl.C.A. Nos. 4269/82, 5592/82, 894/83, 1840/84, 108/85. 4392/88 etc. be implemented at the earliest. Notice dated 5.8.2000 was not complied with and, therefore, AMC was authorised to remove the offending structure and portions put contrary to the terms of licence issued. Notice issued to the petitioner clearly refers to the order passed by City Civil Court at Ahmedabad and AMC was given liberty to remove encroachment and illegal construction or sheds by issuing notice. AMC issued clear notice indicating that the petitioner is required to remove unauthorised encroachment within a period of 10 days and to restore the site in question to the original situation prevailing at the time of issuance of licence. It is clearly indicated in the notice that non-compliance of notice may bring to any action in accordance with law.

(iii) It is the say of AMC that in view of the fact that petitioner had failed to remove illegal construction made on the site in question and the encroachment made thereon, AMC, with a view to implement directions issued by this Court and with a view to implement the scheme, has removed the structure in question and has taken steps to cancel the licence for breach of conditions of licence. On failure to comply with the notice served by the Corporation, said action is taken and it cannot be said that action is high-handed or illegal or in violation of the principles of natural justice. AMC has produced certain photographs in support of its say and it is contended that the offending structure and encroachment which was made by the petitioner and others on both the sides of the public street-road, is on the footpath and public street which is very much part of non-hawking zone declared under the scheme. There cannot be exception in view of the scheme framed and approved by the High Court and the Apex Court with certain observations as stated above. According to AMC, this is a case of breach of condition nos. 2, 4, 12, 18 & 20 of the licence and, therefore, as per condition no.23 of licence issued in favour of the petitioner and others, steps for cancellation of licence were taken.

8(i) Learned counsel appearing for the parties have taken us through the relevant case law by referring various judgments of this Court and the Apex Court. Mr. Mihir Joshi, learned counsel appearing for the petitioners has placed reliance on certain judgments of other High Courts also. Considering the nature of relief prayed by the petitioner in the back ground of the facts narrated in the petition, even if we think to lean in favour of the petitioner and other larri owners who have filed the petition, within the robe of equity and law, it cannot be done. This is not a case of removal of legal or authorised construction nor of a action without notice. It can technically be argued that there is no specific notice for cancellation of licence or the total removal of larri-gallas from the area. Case of the petitioner, of course, is confined to technicality for himself, but indirectly, he represents each person whose offending structure has been removed and/or licences are cancelled. Notice produced by the petitioner dated 5.8.2000 shows that an opportunity was afforded by the Corporation to the petitioner and by referring the order of City Civil Court, AMC had asked the petitioner to remove the offending construction and to restore the position on the day on which licence was issued. Careful reading of each paper available on record and on perusal of the photographs produced by the Corporation before us, we are not convinced that so-called offending structure was pulled down by the petitioner on 12.9.2000 himself and by other larriwalas possessing licence. Resolution of AMC passed in the year 1977-78 and 1982-83 and the decision to issue NOC facilitating them to obtain electric connection in the year 1992 is not much relevant, considering the point at issue before us. Ahmedabad has grown in each corner by leaps and bounds and, therefore, litigation concerning larri-gallawalas and pitch vendors has reached to the door steps of this Court on various occasions. Though it is contended that in the year 1982-83, AMC was to put up a permanent structure of various shops in Law Garden area in line with the structure put up near Kankaria lake at Maninagar and some resolutions were passed by the Corporation in this regard according to the petitioner, but he has not produced any such resolution. On the contrary, with the development of traffic and density of the area, it seems that the Corporation imposed certain stringent conditions as admitted and accepted by the petitioner in para-7 of the petition and, therefore only, writ petition was brought before this Court and before it reached to its logical conclusion, the same was withdrawn. We are not convinced on the bare words of the petitioner that as the

AMC was to put up permanent structure on the line of Kankaria lake, petition was withdrawn. Paras 6 & 7, if appreciated properly, it can be easily said that theory put forward while developing the case, creates contradiction.

(ii) If AMC was of the view that some permanent structure should be developed in the area where the petitioner was granted licence, the Corporation ought not to have decided to impose conditions which may result in considerable inconvenience. On the contrary, plain reading of para-7 of the petition gives an impression that all larriwalas must have been asked to leave the place of their business after completion of business hours so that flow of pedestrians and the city traffic can take advantage of the street for a whole day till 5.00 P.M. Eatable vendors were doing their business since years in Law Garden area, by putting some historical back ground of the development on the facts situation for the larriwalas in the area, the petitioner has tried to justify the existence of offending structure and illegal construction put by him and others. We have considered NOC given for obtaining electric connection and language of undertaking given by the petitioner as per the condition of the resolution passed by AMC for the purpose which makes it amply clear that resolution to issue NOC to the petitioner for getting electric connection, has not made alleged right of the petitioner perpetual. On the contrary, the petitioner had accepted that for the purpose of widening of the road, as and when AMC needs place of the petitioner licence-holder, he would surrender the same without asking for any type of compensation. It is also an admitted/ accepted by the petitioner that in such eventuality, the petitioner also will not pray for alternative place from AMC. Plain reading of paras- 6 to 9 of the petition raises doubt as to the bonafides of the litigation. Though the petitioner has referred to Civil Suit No. 168/93 filed and disposed of by City Civil Court, but has pleaded his ignorance or so-called unawareness as to the earlier proceedings taken up to the Supreme Court. Though the petitioner has stated on oath that he would adduce effect of such proceedings qua subject area after ascertaining facts, same is not adduced as to the effect of the situation which has emerged on the day on which the scheme referred by AMC in affidavit-in-reply and further affidavit, which is under contemplation since 31.12.94. On one hand, while replying the notice dated 5.8.2000, the petitioner has categorically stated that there is no unauthorised or illegal or offending construction, on the other hand he submits that he himself had pulled down

certain offending structure on 12.9.2000. The say of the petitioner is that he was carrying on business as per the terms of licence with the facilities provided by AMC. On the other hand, page -44 indicates that the President of the registered association of licence holders of Ellisbridge Final Plot No. 430(Part) gives an assurance to the Municipal Commissioner of AMC that within 4 (four) days, they will remove all otas falling on road, all encroachments on footpath. It is also said in the letter dated 22.12.1995 that all sheds have been removed and "encroachment of some persons who have still not removed the same, is being removed." Photographs produced by AMC as to the situation of the spot or say area, reveals that since years, at least by immediately after 1985-86 till the date on which AMC removed the offending structure and unauthorised construction, the petitioner must be, along with other licence holders, indulged in foul play and there is no iota of bonafide behaviour which has reflected from the papers available on record. We are not ready to accept the say of the petitioner which is brought on record subsequently by amending petition that he was not aware about the scheme framed by this Court and approved with certain observations and directions of Apex Court qua larriwalas- gallawalas or pitch vendors.

(iii) It is rightly pointed out to us during the course of oral arguments that road and footpath and pavements adjacent to public garden is included in no-hawking zone as per the scheme. Of course, the petitioner has pleaded that this inclusion is highly unreasonable and, therefore, illegal because prohibiting hawking near public garden seems in fact to go absolutely hand in hand and in complements with each other and the same atleast would not apply to the area of Law Garden meeting the individual perception of the petitioner as the same is contrary to the previous orders passed by this Court and the order passed by the Division Bench in PIL involving the similar facts, cannot be accepted irrespective of other set of facts and legal contingencies. According to us, this type of plea taken by the petitioner, by itself, is unconvincing. It is amply clear that in light of sec. 313, 313A, 314(3) and 497 of Bombay Provincial Municipal Corporations Act,1949 (BPMC Act), the scheme for licensing hawkers in greater Bombay was proposed by the Municipal Commissioner of Bombay and was accepted by the Court, of course with suggestions, while adopting certain modalities regarding hawking and non-hawking zones. But hawkers association and trade union having large number of hawkers on its membership roll, had challenged the scheme framed by the Municipal Commissioner of Bombay and ultimately the dispute was taken up to the Apex Court and

Apex Court, in the case of Bombay Hawker's Union and others v/s Bombay Municipal Corporation and others, reported in (1985)3 SCC 528, has held while dealing with the petition under Article 32 of the Constitution of India that the impugned provisions of BPMC Act are in the nature of reasonable restrictions,in the interests of general public, on the exercise of the right of hawkers to carry on their trade or business. No one has any right to do his or her trade or business so as to cause nuisance, annoyance or inconvenience to the other members of the public. Public streets, by their very nomenclature and definition, are meant for the use of the general public. They are not laid to facilitate the carrying on of private trade or business. AMC, because of various litigations, framed a scheme and the scheme was brought before this Court for its scrutiny. We have, carefully considered certain orders produced on behalf of AMC. One such order is the order dated 22.4.1987 (Coram: P.R. Gokulakrishnan, CJ & G.T.Nanavati, J) in group of Spl.C.A.No. 4269/82, 5592/82, 894/83, 1840/84, 108/85, 4392/81 etc. in light of the observations made by the Apex Court in Special Leave to Appeal (Civil) No.47-51, 195-200 and 1083-92, 1099 all of 1986 with writ petition No.1354, 859 & 958 & group all of 1986. It transpires that after impugned judgment delivered by the Gujarat High Court, AMC framed final scheme and while dealing with that scheme, this Court has observed that "having examined the scheme ourselves and having heard objections raised on behalf of the petitioner and also having heard learned counsel for both the sides, we are of the view that the scheme framed by the respondent Corporation (AMC) deserves to be accepted subject to the modification suggested herein above." So, it is rightly submitted that no special reference qua licence holders near Law Garden is made. Again, on 7.12.1987, Division Bench, further scrutinised the approved scheme as per the order passed by the Apex Court on 8.10.1987 as this Court was directed to consider the difficulties which may be faced before the Court by the petitioners i.e. Maha Gujarat Hawkers Vepari Mahamandal etc. in all concerned matters and the Apex Court directed this Court to make a report whether scheme has been modified by this Court needs further modification in the light of the representation made by the petitioners, or other hawkers (emphasis supplied).

(iv) It is clear from the order dated 7.12.1987 that no representation was received from any of the parties on or before 2.11.1987. After hearing the counsel appearing for the parties, Division Bench of this Court (Coram: P.R. Gokulakrishnan, CJ & G.T.Nanavati, J) held that "we do not think that in view of the representation made

by the concerned parties, any modification except the one which we have suggested above, deserves to be made." We are inclined to note that one modification suggested by the Apex Court does not carve out a special case to a hawker who is carrying on business on the foothpath or on a public street in the area near Law Garden. Supreme Court accepted the report of this Court and vide its order dated 6.1.1988 (Coram: E.S. Venkatramaiyah & S.Wadhva, JJ), directed to implement the scheme framed by AMC and observed that "if any difficulty arises in implementation of the judgment of the High Court, further directions may be sought from the High court by the parties concerned. Hence, interim order made in this petition stands vacated." Thereafter, scheme was implemented and a public notice of the scheme was issued. It is rightly submitted that the action of the AMC is in accordance with the well-settled principles of law and more particularly in conformity with the judgments reported in (1985)3 SCC 528, (1985)3 SCC 545, JT 1989(3) SC 553, 1997(3) GLR 1998 & 2431 and 1986 GLH 616. Undisputedly, as the petitioner and others were encroachers and were using licence part in violation of more than one conditions and encroaching upon the public street and erecting unauthorised superstructure, cannot claim any fundamental right under Articles 19(1)(e) & 19(1)(g) of the Constitution of India. We do not see any need to reproduce the relevant observations made in the aforesaid judgements at this stage. We are not satisfied that the submission and case put forward by the petitioner that this is a case wherein the petitioner and others can pray to this Court that this is a case of extreme difficulty in implementation of the scheme or judgment of the High Court and some other and further directions against AMC requires to be given.

(v) A Divison Bench of this Court to which one of us was a party, while dealing with Spl.Civil Application No.4963/200 with Spl.C.A. No.4998/2000, in the case of New Gujarat Swantra Swarojgar Sangh v/s Municipal Corporation of the City of Ahmedabad, after considering various decisions of this Court as well as of Apex Court, has observed and held as under :-

" With regard to the pitch licence and larri gallas etc., a Division Bench of this Court on different occasions considered the submissions made by the learned counsel apapearing in different matters from Ahmedabad, Vadodara and Surat. There is a scheme approved by the Apex Court, according to which the licensees are to be given for pitch licences. We have gone through

> the decisions of this Court in Special Civil Application No. 2584 of 1980 and 2635 of 1980 dated 23.12.1985. In the case of Bombay Hawkers Union v. Bombay Municipal Corporation, reported in (1985) 3 SCC 528, the scheme framed by the Corporation was approved by the Court. Subsequently, in view of the directions given by the Supreme Court in Writ Petition No. 656 of 1987 with other matters, a direction was issued by the Division Bench dated April 22,1987. We have gone through the directions given by the Supreme Court in Special Leave to Appeal (Civil) Nos. 47-51, 199, 200/86 and Writ Petition Nos. 1354, 859, 511/86 with other matters and the decision of the Apex Court in Special Leave Petition No. 2296-98 etc. of 1986. In Special Civil Application No.6864 of 1987, the Court has also passed an order subsequently on 6.2.1988. The order has been made by the Division Bench in Special Civil Applications Nos. 2356 of 1980 and 4117 of 1980 and the matter raising similar questions has been disposed of. Therefore, the only direction that can be given is to the effect that if the petitioners make an application for pitch licence in acordance with the scheme, the respondent Corporation shall consider the same in accordance with law. It goes without saying that the individual will have to make an application for such licence."

This decision has a bearing effect on all the questions raised by the petitioners in both the petitions.

9(i) Area where the petitioner along with other 35 vendors were granted licence to carry on their business, is brought before us by way of a map produced by AMC. Of course, the same is not as per the exact scale, but it gives clear picture of the situation and tallies with the facts narrated by the parties before us revealed from the record. In reality, it is shown that only 14 persons are enjoying the places which were demarcated for 35 hawkers. This fact is not disputed by the petitioner. Otherside of the road has been encroached by various persons. AMC has shown the areas of clear encroachment by putting red colour. Area demarcated by green colour in the map shows a stripe of land which was made available from garden lands to accommodate larriwalas as mentioned in the petition. According to us, it is doubtful whether the Standing Committee of AMC was authorised to demarcate the land from public garden only to accommodate the hawkers

ignoring the fact as to the nature of use of Law Garden by number of persons and the same was important lung for fresh air in the area. We have seen the language of a letter dated 1.10.1997 written on behalf of Municipal Commissioner which is produced by AMC. This letter was considered by the Standing Committee while passing the resolution dated 18.10.1977 (Page 10 of the petition). In the letter which was placed before the Standing Committee, two different places were suggested. From the letter and resolution, an important fact which emerges is that some part of Law Garden is put to exclusive use for blind persons. When area which is adjacent to larri-stand was demarcate and for the use of blind persons, why such a decision is taken to allot permanent larri stands in that area ignoring the vulnerability to encroachment and obstruction on that road, is the question. Of course, we are not scrutinising the legality of the resolution passed by the Standing Committee in the year 1977, when considering the need of time, pace and place, AMC, in compliance of the various orders passed earlier by this Court and to implement the scheme evolved and implemented since 1988-94, why the same should be held illegal or unauthorised or evolved all of a sudden. As indicated by the respondent Corporation that originally 35 hawkers were allowed and at the time of action 14 persons were occupying the area meant for 35 hawkers. In Olga Tellis case, the Apex Court has pointed out how slumlords are earning. In case of Almitra H.Patel v/s Union of India, (2000) 2 SCC 679 dealing with disposdal of solid waste for clearing up Delhi to protect environment from pollution, the Court made following observations:-

"Establishment or creating of slums, it seems, appears to be good business and is well organised The number of slums has multiplied in the last few years of geometrical proportion. Large areas of public land, in this way, are usurped for private use free of cost. It is difficult to believe that this can happen in the capital of the country without passive or active connivance of the land-owning agencies and/or the municipal authorities. The promise of free land, at the taxpayers' cost, in place of a juggi, is a proposal which attracts more land-grabbers. Rewarding an encroacher on public land with a free alternative site is like giving a reward to a pickpocket. The Department of Slum Clearance does not seem to have cleared any slum despite its being in existence for decades. In fact more and more slums are coming into existence.

> Instead of "slum clearance" there is "clum creation" in Delhi. This in turn gives rise to domestic waste being strewn on open land in and around the slums. This can best be controlled at least, in the first instance, by preventing the growth of slums. The authorities must realise that there is a limit to which the population of a city can be increased, without enlarging its size. In other words the density of population per square kilometer cannot be allowed to increase beyond the sustainable limit. Creation of slums resulting in increase in density has to be prevented. What the Slum Clearance Department has to show, however, does not seem to be visible. It is the garbage and solid waste generated by these slums which require to be dealt with most expeditiously and on the basis of priority."

At this juncture, it would be also relevant to consider the intention of permitting lorry stands. In order to eke out a living for the poor, permission is granted to vend etables on lorries. One of the conditions of such permission is that the lorries should not be kept permanent at a fixed place and it ought to be moving from place to place. With this in mind, if one looks at the photographs which are on the record, a totally contrary situation is found to be in existence. Shops with base erected on earth, illuminated at its full peak, with tables and chairs set in and decorated at an "intercontinental style", is what is in existence, at the lorry stand. These can be termed only as "restaurants" and not "lorries". The terms and conditions of granting permission for lorry stand is thrown out wide in the air flagrantly.

(ii) It is also required to be noted that garden as per the Town Planning Scheme must be maintained. It is also required to be noted that the area of the garden cannot be changed in view of the TP Scheme. Unless and until the scheme is varied, the area of the garden cannot be changed, and in any case, the size of it cannot be reduced. In the instant case, the Standing Committee by passing a resolution, has reduced the size of the garden by a strip of about 10 ft. or so, and thus large area of the garden was reduced. That is not permissible, and Standing Committee, at the most, could have requested the General Board to make a suggestion to the State Government in this behalf for modification and/or varying of the scheme, but arbitrarily, contrary to the provisions of law, Standing Committee has no powr to

reduce the size of the garden. In view of this also, the action of the Corporation is contrary to law and the area cannot be allotted to anyone. And it be noted further that as per the changs made in the Scheme, the size of the garden is reduced for widening the road, and actually it has been put into practice, and therefore also, on the road or on footpath, it is not permissible for the Corporation to allow hawkers to occupy the foot path.

(iii) Apprehension of encroachment and obstruction to traffic expressed even at the time when resolution came to be passed by the Standing Committee to accommodate 36 larriwalas, had come true. Even than AMC had shown leniency even on the day on which notice dated 5.8.2000 was issued to the petitioner and others licence holders. Deliberate non-compliance and in habit of playing fraud with AMC since years, has brought these petitioners to the present situation.

(iv) Falsity emerges from the pleadings, and if it is confirmed after evaluating the case put forward by the resisting party and the documents produced by both the sides, then any type of writ, either prohibitory or mandatory should not be granted, otherwise every such person would be tempted to rush to this Court by invoking jurisdiction under Article 226 of the Constitution of India. Jurisdiction of the High Court under Article 226 is evaluated and examined on various occasions and in light of different set of facts irrespective of the field, but the petitioner who seeks some help or relief from this Court invoking jurisdiction under Article 226 of the Constitution, must have ability to show that truth is the only weapon in his hand and truth is only defence with him. Suppression of some facts is also relevant. We are informed that irrespective of the fact that plaintiff was one of the encroacher on the public street and footpath, land under occupation or in possession of the petitioner was within the road side land. AMC has started the work of widening of road leading to Nehru Bridge from the area known as C.G.Road-Nagari Hospital and the land through the lands owned and occupied by Gujarat Law Society. Part-plan showing the position of Final Plot No. 430 TP Scheme No.3 of Ahmedabad (Ellisbridge) (Changispur Sec.) indicates that TP Road boundary as per the draft revised plan of 1997 which has been now approved and implemented having effect of a Statute, indicates that where the stand pass and licence was granted to the petitioner, was the road in the width of 80 ft. Now the same is to be widened up to 100 ft. Otherwise, some of the land of Law Garden beyond the place where these 36 stands were carved out, will be the

part of a public road. As per say of the petitioner , he encroached upon the public road and the street and his say is that he may be allowed to occupy the place carved out from the garden, however, that carved out place has been converted into a public road in view of TP Scheme amended in 1997 and that part now forms the part of the street. So, technically speaking, the petitioner was on the public road. As per the undertaking given by the petitioner and others while praying for NOC from AMC for getting electric connection, he has agreed to leave the place without claiming any compensation or without claiming alternative place. If the same is construed in its true perspective, then, it would not be legitimate for the petitioner to argue that notice dated 5.8.2000 was insufficient or whether his removal was unauthorised or illegal. Opportunity as reflected in the notice itself referred in the order of City Civil Court, was not availed of, then AMC was legally authorised to take appropriate step which was clearly mentioned in the latter part of the notice. Action of cancelling licence and totally uprooting the encroachers, cannot be said to be high-handed action.

10. We have considered the conditions enumerated in the licence initially granted to the petitioner and others and condition no.23 is very clear. This licence-parvana can be equated with agreement bi-parte. If the Court is satisfied that there is a breach of more than one conditions material in nature, then it would not be legal or proper to hold that action of AMC is discriminatory or in violation of principles of natural justice. The alleged breach was brought to the notice of the petitioner by stating the same in the notice itself. It is, therefore, rightly submitted before us that just to come out of the contingency which has cropped up because of the conduct of the petitioner and others, the petitioner has shown unawareness or ignorance about the litigation fought upto the Apex Court.Similar unawareness or ignorance is shown qua notification published in lieu of the scheme where the area near by garden is notified as non-hawking zone. The present petitioner has sought certain reliefs which can go to the root of the legality and validity of the scheme implemented and published since 1988-94 and no such reliefs can be granted on the ground of delay and latches. According to us, ignorance and unawareness shown on both the counts by the petitioner is convenient shelter having no roof over it. If any of the reliefs prayed for by the petitioner and others, if is granted, the same would be contrary to and in violation of the scheme approved under the provisions of Town Planning Act.

11. Mr. Mihir Joshi, Learned counsel appearing for the petitioner has placed reliance on various judgments and we would like to deal with the some of the important decisions which are made base of the submissions advanced by learned counsel Mr. Joshi for the petitioner. Mr. Joshi, while developing the case, has submitted that issuance of stand pass was a part of the scheme framed for hawkers-squatters and it is not a matter of dispute that certain facilities were granted to the petitioner and other persons such as water, drainage, paved flooring and electricity. Therefore, action of AMC of total removal can be termed as arbitrary and far from reasonableness. The petitioner & others are praying to permit them only to keep larri of the size mentioned in the licence. When AMC has continuously accepted licence fees even after notifying non-hawking zone in the area of Law Garden, summary eviction under the guise of alleged statutory powers or powers under condition no.23 of licence, goes to the root of the right envisaged under Article 21 of the Constitution of India. Act is also discriminatory as many of such offending structures have remained untouched till the date of oral submissions. In the first set of arguments, learned counsel Mr.Joshi has concentrated on Articles 19(1)(e), 19(1)(g) and 19(6) of Constitution of India and in the second set of his submissions, he has submitted that this is a fit case for judicial review considering the rights envisaged under Articles 14 & 21 of the Constitution of India. Mr. Joshi has placed reliance mainly on the following decisions:-

(1) 1969(2) SCC 782
Mohd. Hanif v/s State of Assam.

(2) 1976(3) SCC 607
Union of India v/s Jyoti Chit Fund & Finance.

(3) AIR 1986 SC 180
Olga Tellis v/s Bombay Municipal Corporation.

(4) Unreported Judgment in LPA 246/89 DD on 17.10.1989 by D.B. of Gujarat High Court

(5) 19855(3) SCC 528
Bombay Hawkers Union v/s Bombay Municipal Corporation.

(6) 1989(4) SCC 155

Sodan Singh v/s New Delhi Municipal Committee.

(7) 1993(1) SCC 17
Indian Airlines Corporation v/s Capt. K.C. Shukla.

(8) 1997(7) SCC 463
Union of India v/s G. Ganayuthan.

(9) 1998(2) SCC 727
Sodan Singh v/s N.D.M.C. & Others

(10) 1998(4) SCC 315
State of Maharashtra v/s Alka.B. Hingde.

(11) AIR 1992 Madras 93
P. Vijaykumar v/s Comm. Dharampuri Municipality.

(12) AIR 1993 Bombay 291
Narayan Megha Gohil v/s Municipal Corporation of Greater Bombay.

(13) 1988(1) GLH 289
Nehru Marg Cabin Association through its President v/s Modasa Nagar Palika & Ors.

12. It is pertinent to note that judgments referred to at serial nos.3, 5, 6 & 9 have been relied on by learned counsel appearing for both the sides. We will deal with decisions cited by learned counsel Mr. Joshi, pointwise and issuewise. Decision relied on by Mr. Joshi in the case of Mohd. Hanif v/s State of Assam (supra), deals with the remedy in public law and same relates to the jurisdiction of this court to deal with issues raised by the petitioner and we accept that this is not a case which can be thrown out on the technical plea as to jurisdiction of this court. We are also not inclined to accept the submission of AMC that this petition should be dismissed on the ground of alternative and efficatious remedy. So, the decision relied on by the petitioner in the case of Union of India v/s Jyoti Chit Fund & Finance (supra) dealing with the provisions of sec. 437A(1) of the BPMC Act, is not required to be dealt with. According to Mr. Joshi, unreported decision of Division Bench of this Court in LPA No. 246/89 decided on 17.10.1989, wherein the Division Bench has also referred the decision in the case of Olga Tellis (supra), squarely applies to the facts of this case. Division Bench has considered two important decisions,

namely (i) Olga Tellis's (supra), and (ii) Nehru Marg Cabin Association v/s Modasa Nagarpalika, reported in 29(1) GLR 441. Mr. Joshi has drawn our attention to relevant paragraphs of said unreported decision and has argued that uprooting the cabin holders suddenly, in an "encroachment removal drive", is violative of rights as envisaged under Article 21 & 14 of the Constitution of India. We have also considered decisions in the case of Dalvadi Laljibhai Gatorbhai & Ors. v/s State of Gujarat & Ors., reported in 1995(2) GLR 974 and Gulamali Gulamnabi Shaikh v/s Municipal Commissioner, reported in 1986 GLH 616. In the case of Dalvadi Laljibhai (Supra), decision in the case of Gulamali (supra) is distinguished by the Division Bench and the principles laid down in the decision in Nehru Marg Cabin Association (supra) is reiterated. Both the sides have concentrated their arguments relying on three decisions viz. Olga Tellis, Bombay Hawkers Union and Sodan Singh respectively (supra). Relying on the aforesaid three decisions and relying on the ratio propounded by the Division Bench of this Court in LPA No.246/89, learned counsel Mr. Joshi has submitted that action taken by AMC is neither fair nor just and the same is taken without following the reasonable procedure. In case of Nehru Marg Cabin Association (supra), removal of the cabins of refugees who have migrated from Pakistan and settled there, were under the threats of removal of their cabins. Cabin holders were alloted road side land as they were helpless uprooted and migrated persons under a circular issued by the State Government and, therefore, it was agitated that they should not be removed without following proper procedure. After decision of the Division Bench of this Court in LPA 246/89 and decision in the case of Nehru Marg Cabin Association (supra), this Court and the Apex Court have issued various guidelines and have made serveral observations and brushed the rights envisaged under Articles 19(1)(e), 19(1)(g) & 21 of the Constitution of India, especially while dealing with the cases involving public interest and public laws. Sodan Singh's case (supra) mainly deals with the establishment of squatters and hawkers and all the three decisions have considered the right to life seriously. Right to life is one of the fundamental rights under the Constitution and it has to be considered seriously. Apex Court, while dealing with Sodan Singh's case (supra), has considered the case of squatters and hawkers who are basically poor and observed that they cannot claim or assert fundamental right to occupy a particular part or permanent place. We agree that street-trading is an important feature of the economy of this country and a right to have trading on the road side land or on the street even if accepted as a

right to life, even then the same is subject to reasonable restrictions. Municipal Commissioner may have an authority to permit hawkers and squatters on the terms and conditions deemed fit and coinvenient. In Sodan Singh's case, even Advocate appearing for the squatters and hawkers has accepted before the Court that in such a cases, some scheme should be framed. At one stage, it was the grievance of the learned counsel that scheme was not implemented and some encroachers or wrong-doers were enjoying the public street and the Apex Court by suggesting modality, directed to implement the report submitted by Mr. Thareja Committee and to provide infrasctructure. We would like to quote relevant observations made by the Apex Court in Sodan Singh's Case (supra), as under:-

"18. The provisions of the Municipal Acts should be construed in the light of the above proposition. In case of ambiguity, they should receive a beneficial interpretation, which may enable the municipalities to liberally exercise their authority both, in granting permission to individuals for making other uses of the pavements, and, for removal of any encroachment which may, in their opinion, be constituting undesirable obstruction to the travelling public. The provisions of the Delhi Municipal Corporation Act, 1957, are clear and nobody disputes before us that the Municipal Corporation of Delhi has full authority to permit hawkers and squatters on the sidewalks where they consider it practical and convenient. Insofar the Punjab Municipal Act,1911 applying to the New Delhi area is concerned, the bench constituted by three learned Judges observed in Pyare Lal case that the provisions did not authorise the municipality to permit stalls to be set up in the streets except temporarily on special occasions, like festivals, etc. and that the permission to the petitioner in that case had been wrongly granted initially. We do not agree with these observations, although it appears that in the light of the other circumstances, indicated in the judgment, the decision was a correct one. The provisions of both Sections 173 and 188 should receive liberal construction, so that the New Delhi Municipal Committee may be in a position to exercise full authority. Indeed some of the documents on the records before us indicate that the Committee had been in the past actually permitting hawkers and squatters on pavements in certain areas.

19. The controversy in the present case, however, cannot be settled by what has been said earlier. The claim of the petitioners before us is much higher. They assert the right to occupy specific places on road pavements alleging that they have been so doing in the past. As has been stated earlier, the facts have been disputed and individual cases will be considered separately in the light of the present judgment. The argument, however, which has been pressed on behalf of the petitioners is that they have their fundamental rights guaranteed by Articles 19 and 21 of the Constitution to occupy specific places demarcated on the pavements on a permanent basis for running their business. We do not think there is any question of application of Article 21 and we will be briefly indicating our reasons therefor later. But can there be at all a fundamental right of a citizen to occupy a particular place on the pavement where he can squat and engage in trading business ? We have no hesitation in answering the issue against the petitioners. The petitioners do have the fundamental right to carry on a trade or business of their choice, but not to do so on a particular place. The position can be appreciated better in the light of two decisions of this Court in Fertilizer Corporation Kamgar Union v/s Union of India and Rajendran v/s State of Tamil Nadu.

20. In the Fertilizer Corporation case the workmen of the respondent Corporation challenged the legality of the sale of certain plants and equipments of the Sindri Fertilizer Factory inter alia on the ground that a large number of workers would be retrenched as a result of the sale. They argued that the sale would deprive them of their fundamental right under Article 19(1)(g) to carry on their occupation as industrial workers. A bench of five Judges of this Court rejected the plea holding that Article 19(1)(g) confers a broad and general right which is available to all persons to do work of a particular kind and of their choice, but it does not confer the right to hold a particular job or to occupy a particular post of one's choice. The right to pursue a calling or to carry on an occupation is not the same thing as the right to work in a particular post. If the workers were retrenched consequent upon an on account of the sale it would be open

to them to pursue their rights and remedies under the labour laws. But the closure of an establishment in which a workman for the time being was employed did not by itself infringe his fundamental right to carry on an occupation which is guaranteed by Article 19(1)(g). "The choice and freedom of the workers to work as industrial workers is not affected by the sale. The sale may at the highest effect their locum, but it does not affect their locus, to work as industrial workers." (SCC p.576 para 14). This decision was followed in K.Rajendran v/s State of Tamil Nadu which arose out of a policy decision taken by the State of Tamil Nadu to abolish all the posts of part-time Village Officers. An Ordinance was promulgated for this purpose and was later replaced by an Act. Rejecting the appeal of the appellants this Court held that the impugned Act did not violate Article 19(1)(g) as it did not affect the right of the incumbents of posts to carry on any occupation of their choice, even though they may not be able to stick on to the posts which they were holding. The ratio of these decisions apply with full force to the cases where the right to pursue a trade or business is involved. If the opposite view is taken and the plea of the petitioners is allowed a chaotic situation may follow. They may be entitled to insist that they would carry on their business anywhere they like, either on the roads or in the government schools or hospitals or other public buildings. They may like to enter the classrooms or the patient wards or any public office to advance their prospects. As was observed in the Bombay Hawkers' case they can hold the society to ransom by squatting on the busy thoroughfare, thereby paralysing all civil life.

21. We do not find any merit in the arguments founded on Article 21 of the Constitution. In our opinion Article 21 is not attracted in a case of trade or business and the concept of life and personal liberty within Article 21 are too remote to be connected together. The case of Olga Tellis v/s Bombay Municipal Corporation heavily relied upon on behalf of the petitioners, is clearly distinguishable. The petitioners in that case were very poor persons who had made pavements their homes existing in the midst of fifth and squalor, which had to be seen to be

believed. Rabid dogs in search of sinking meat and cats in search of hungry rats kept them company. They cooked and slept where they eased, for no conveniences were available to them. Their daughters, coming of age, bathed under the nosy gaze of passers by, unmindful of the feminine sense of bashfulness. They had to stay on the pavements, so that they could get odds jobs in the city. It was not a case of a business of selling articles after investing some capital, howsoever meagre. It is significant to note that the judgment in Bombay Hawkers' Union v. Bombay Municipal Corporation and that in Olga Tellis were delivered within a week, both by Y.V. Chandrachud, C.J. Some of the counsel appearing in two cases were common, and that while dealing with the rights of the squatting hawkers in the former case the learned Chief Justice confined the consideration of the right under Article 19(1)(g) of the Constitution. Besides, the court in the Olga Tellis affirmed the validity of Section 314 of the Bombay Municipal Corporation Act on the ground that (SCC p.578, para 42) :

"removal of encroachments on the footpaths or pavements over which the public has the right of passage or access, cannot be regarded as unreasonable, unfair or unjust."

In this connection, the court further proceeded to say : (Nawabkhan's case (Supra) Para-7)

"Footpaths or pavements are public properties which are intended to serve the convenience of the general public. They are not laid for private use and indeed, their use for a private purpose frustrates the very object for which they are carved out from portions of public streets. The main reasons for laying out pavements is to ensure that the pedestrians are able to go about their daily affairs with a reasonable measure of safety and security. That set at naught by allowing encroachments to be made on the pavements. There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavements dwellers to put up constructions on pavements and that of

> the pedestrians to make use of the pavements for passing and re-passing, are competing claims and that the former should be preferred to the latter. No one has the right to make use of a public property for a private purpose without the requisite authorisation and, therefore, it is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon. Public streets, of which pavements form a part, are primarily dedicated for the purpose of passage and, even the pedestrians have but the limited right of using pavements for the purpose of passing and re-passing. So long as a person does not transgress the limited purpose for which the pavements are made, his use thereof is legitimate and lawful. But, if a person puts any public property to a use for which it is not intended and is not authorised so to use it, he becomes a trespasser. The common example which is cited in some of the English cases (see, for example, Hicknan v. Maisey) is that if a person, while using a highway for passage, sits down for a time to rest himself by the side of the road, he does not commit a trespass. But, if a person puts up a dwelling on the pavement, whatever may be the economic compulsions behind such an act, his user of the pavement would become unauthorised."

It is also worth nothing that assurances had been given on behalf of the State Government in its pleadings before this Court which was repeatedly mentioned in the judgment.

22. On behalf of some of the petitioners it was contended that in view of the inclusion of the word "socialist" in the Preamble of the Constitution by the 42nd Amendment greater concern must be shown to improve the condition of the poor population in the country, and every effort should be made to allow them as much benefit as may be possible. There cannot be any quarrel with this proposition, but that by itself cannot remedy all the problems arising from poverty. Even the Constitution as it stood

> originally was committed to economic justice and welfare of the needy. But for the reason either then or now the other provisions of the Constitution and the laws cannot be ignored. It is, therefore, not possible to interpret the decision in Olga Tellis in the manner suggested on behalf of the petitioners to bolster their case with the aid of Article 21."

13(i) The case on hand is not the case wherein encroachment is made by the petitioner voluntarily, but the same is not in sheer helplessness, insecurity and bare necessity, as was the fact situation in Sodan Singh's case (supra). In the case of Olga Tellis (supra), the Apex Court has taken care of maximum possible eventuality as the it was concerning large number of human dwellings and slums. It is not the proposition that no notice was given to the present petitioners. It is also not the case of the other side that no notice is required to be given before removal. The say of the petitioner and others, as submitted by learned counsel Mr.Joshi is that there was no notice for total removal and AMC could have removed alleged encroachment or offending structure by leaving larris there according to the position prevailing earlier and AMC should not have prevented the petitioner & others from putting larris as per the original terms of licence. There was no notice for such a harsh removal or action, but considering the case put forward by the AMC, we are of the view that this case cannot be equated with the case wherein administrative authority had started removal of shops or cabins totally without notice. This is also not a case wherein because of interim orders passed by the High Court, in a couple of hours namely 72 hours, Commissioner was directed to demolish hutments dwellings allegedly erected illegally or by encroaching public place or road. This is a case wherein advance notice of several days was served and action is taken to comply some orders passed by this Court in one of the pending public interest litigation on or about 13.9.2000 i.e. approximately after 38 days from the date of service of notice. So all the arguments based on the plea of non-availability of an opportunity of being heard is found unconvincing. It was open for the petitioner and others to withdraw themselves from the area of road side. It is rightly submitted that AMC is obliged to implement law, policy and the orders of the Court wherein the Corporation is asked to perform obligatory duties by the orders of the Court directing to do so. AMC has resorted to statutory powers and the authority or right under condition no.23 of the licence. There was notice to the

petitioner & others that AMC may take action which otherwise AMC is authorised to take. So, even if we agree to the principle that by putting reasonable restriction within the meaning of Article 19(6) of the Constitution or while taking action concerning a right to life envisaged under Article 21 of the Constitution, the authority must act in a manner which can be said to be just, reasonable and fair,even then, the present petitioner and others have no good case.

(ii) It is also required to be noted that garden is the main place for recreation for the middle class people. This garden is in existence since several years. Thereafter, the population of the City has increased by several lakhs touching the figure in the vicinity of almost 50 lakhs now, but there is no corresponding growth inthe number of garden. With these scenario in mind, any reduction in the size of the existing garden is not in public interest at all, and therefore, cannot be permitted. Moreover, people go to the gardens for relaxing, for spending some moments peacefully, and for recreation. If commercial activities are permitted adjoining to the garden, the very purpose of garden is frustrated and, therefore, permitting commercial activities adjoining to the garden is also not in public interest. By committing breach of the provisions contained in the Gujarat Town Planning and Urban Development Act, the Corporation permitted to keep larries in a place meant for garden, by reducing the size of the garden.

(iii) In our opinion, impugned action cannot be said to be violative of Article 21 of the Constitution since the area of law garden is excluded from the hawking zones as notified in the Scheme. Policy of AMC was very-well before the petitioner and others. Ignorance pleaded , as discussed earlier, is not found acceptable. We also do not agree that the alleged encroachment or even business of the petitioner and others was under sheer compulsion or was a compelling necessity. We have seen the map given to us at our instance with a view to appreciate the case of the petitioner and others. Said map shows TP Road boundary as per 1987 and 1997 concerning Final Plot No. 430 of Law Garden area which is a traffic island almost triangular in shape. It is not a matter of dispute that Public Auditorium, State Level NCC Head Quarters, School, Colleges etc. are situated on the other side of the road. One road proceeds towards Nehru Bridge as stated before us and one road proceeds towards Nagri Hospital situated at a very short distance. So, criterias considered by the Apex Court while dealing with

the aforesaid three decisions viz. Bombay Hawkers Union, Sodan Singh and Nehru Marg Cabin Association respectively (supra), if applied to the facts of the present case, then this Court would not be in a position to grant any of the reliefs prayed by the petitioner and others, as the ratio propounded in the aforesaid three decisions is not applicable to the present case at all. On the contrary, observations made in the case of AMC v/s Nawabkhan Gulabkhan & Ors., reported in 1997(3) GLR 1998, by the Apex Court and decision of this Court in the case of Paman Bhobhrajmal Navlani v/s Deputy Municipal Commissioner, Vadodara & Ors., reported in 1997(3) GLR 2431, strengthens the case of AMC.

(iv) A Divison Bench of this Court, to which one of us was a party, in Special Civil Application No. 8422 of 1988 decided on 7th November 2000, following the decision in the case of Ahmedabad Municipal Coporation v. Nawabkhan Gulabkhan Pathan And Ors. (AIR 1997 SC 152) AND Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors. (AIR 1986 SC 180), has observed as under in para-5 of the judgment :-

"5. From the decisions in the cases of Ahmedabad Municipal Corporation v. Nawabkhan Gulabkhan and others, (AIR 1997 SC 152) and Olga Tellis and others v. Bombay Municipal Corporation and others (AIR 1986 SC 180), it is very clear that the encroachers have no right to remain on the public street or footpath and the public street or footpath is required to be kept open for the public for their movements. The Apex Court in the case of Olga Tellis (Supra) pointed out in para -28 as under :

"Encroachment of public property undoubtedly obstructs and upsets planned developemnt, ecology and sanitation. Public property needs to be preserved and protected. It is but the duty of the State and local bodies to ensure the same."

14. Absence of notice or insufficiency in the notice dated 5.8.2000, time and again is urged before us during the course of arguments advanced by the learned counsel Mr. Joshi for the petitioner and others. There are cases where post-decisional hearing qua any administrative actin or executive fiat can be prayed or can be afforded or one can avail an opportunity of

hearing before Court while agitating against the alleged administrative wrong. This is not a case where by mandatory order restoring the original position, AMC should be directed to afford an opportunity of hearing, especially when the roads of the entire area are under the process of widening to implement the sanctioned relevant TP Scheme where FP No.430 (Part) is located. Issue before us is of general public importance. In case of Nawabkhan Gulabkhan Pathan (Supra), it is held that in case of long use, notice of two weeks can be said to be sufficient. In the case on hand, as stated earlier, 10 days time was granted and even thereafter, for several days, no action, may be in the interest of justice, was taken. Till the date of petition or till the date on which AMC removed encroachment on the road, petitioner & others have not tried to remove unauthorised structure in question excluded from non-hawking zone. Merely because the petitioner and others were holding a licence or stand pass, they are not different from other hawkers and cannot be permitted to have their cabins in non-hawking zone. Taking advantage of long period, they cannot claim to stick to the lands by invoking even provisions of the Easement Act. Area from where the petitioner along with other licence holders were uprooted, is undisputedly a part of public street as per the approved new road plan. Initially, the petitioner was allotted a piece of land from stripe land carved out from garden land on the basis of the decision of the Standing Committee of AMC, but that would not change the status of the petitioner and others and also would not nullify the criterias or modalities adopted and established by the Apex Court in more than one occasions while dealing with the disputes related to hawkers, squatters and cabin holders. In the case of Olga Tellis (Supra), the Apex Court has observed that "normally, we would have directed the Municipal Commissioner to afford an opportunity to the petitioners to show why the encroachments committed by them on pavements or footpaths should not be removed. But the opportunity which was denied by the Commissioner, was granted by us in an ample measure. Both sides having made their contentions elaborately on the facts as well as law. Having considered those contentions, we are of the opinion that the Commissioner was justified in directing the removal of the encroachments committed by the petitioners on pavements, footpaths or accessory roads." Our attention has also been drawn to the decision of the Apex Court in the case of State of Maharashtra v/s Alka B.Hingde (supra), wherein while dealing with the writ petition under Article 136 of the Constitution of India, the Apex Court has observed that reasonable time should be given to the encroachers for removal of large

number of hutments. Removal of large number of hutments within 72 hours ordered by the High Court issuing directions to the Collector, was interfered by the Apex Court and by adding a word of care and caution, the Apex Court enlarged the time for removal on humanitarian grounds. In the case before us, more than reasonable time was given to the petitioner and others.

15. Judicial review prayed by the petitioner and others on the ground of reasonableness and rationality or under the principles of proportionality, is also not warranted as submitted. Decisions in the case of Indian Airlines Corporation v/s Capt.K.C. Shukla (supra), and Union of India v/s G. Ganayuthan (supra), relied on by the learned counsel Mr. Joshi for the petitioner, are on rationality, proportionality and reasonableness.
We agree that administrative or executive action can be revoked by the Courts and the Apex Court had accepted the scope by dealing with various judgments of foreign Courts. We are tempted to quote paras 21,22, 26 & 27 of the decision in the case of Union of India v/s G. Ganayuthan, which reads as under :-

"21. From Tata Cellular and McDowell it is fairly clear that a view has been expressed some what different from Ranjit Thakur that it is still debatable whether proportionality is part of our administrative law. The scope of its applicability in the context of fundamental freedoms was not discussed or gone into.
Statute law in India: Proportionality applies.

22. McDowell however makes it clear that so far as the validity of a statute is concerned, the same can be judged by applying the principle of proportionality for finding out whether the restrictions imposed by the statute are permissible and within the bounds prescribed by our Constitution. McDowell referred to this exception as follows : (SCC pp 738-39 para-43):

"43. ...It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the Court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted."

It has been further observed by the Apex Court as under:-

"26. In a recent case 1996, in R.v/s Ministry of Defence, ex. p Smith in the court of appeal, Lord Bingham, M.R. explained (pp.264-265) the position of the Court in the absence of the Convention and of proportionality, as follows:-

"....The appellants' rights as human beings are very much in issue. It is now accepted that this issue is justiciable. This does not of course mean that the court is thrust into the position of the primary decision-maker." (emphasis supplied).

Focusing on this point more clearly, Henry, L.J. (p.272) explained in the same case as follows:

".... If the convention were part of our law, then, as Simon Brown, L.J. said in the Divisional Court, the primary judgment on this issue would be for the Judges. But, Parliament has not given us that primary jurisdiction on this issue. Our present constitutional role was correctly identified by Simon Brown, L.J. as exercising a secondary or reviewing judgment. As it is, in relation to the convention, the only primary judicial role, lies with the European Court of Human Rights at Strasbourg." (Emphasis supplied).

The Court of appeal agreed with the observations of Simon Brown, L.J. in the Divisional Court.

"27. We are of the view that even in our country- in cases not involving fundamental freedoms- the role of our courts/tribunals in administrative law is purely secondary and while applying Wednesbury and CCSU principles to test the validity of executive action or of administrative action taken in exercise of statutory powers, the courts and tribunals in our country can only go into the matter, as a secondary reviewing court to find out if the executive or the administrator in their primary roles have arrived at a reasonable decision on

the material before them in the light of Wednesbury and CCSU tests. The choice of the options available is for the authority, the court/tribunal cannot substitute its view as to what is reasonable.

Fundamental rights- proportionalityadministrative law- question left open. "

According to us, to judge the validity of the administrative order or directions, normally CCSU test is to be applied to find out whether the decision or action is illegal or the same suffers from the procedural impropriety within the framework of the law applicable and material produced before the Judge. The Court would not, however, go into the correctness of the choice made by the Administrator along with other alternatives open to him, nor would the Court substitute its decision to that of Administrator. Here in the case on hand, considering the order of City Civil Court of Ahmedabad and thereafter other orders passed by this Court in public interest litigation, in our opinion, no interference even on merits is warranted. Under the circumstances, in view of the principles propounded by the Apex Court in Indian Council for Enviro-Legal Action v/s Union of India & Ors., reported in (1996)5 SCC 281 and in the case of Common Cause, A Registered Society v/s Union of India & Ors., reported in (1999)6 SCC 667 and in view of the provisions of BPMC Act, we are not inclined to accept the submissions advanced by learned counsel appearing for the petitioners.

16. We have also gone through the decision of this Court in Spl.Civil Application Nos. 2584/80 ands 2635/80 dated 23.12.1985 In the case of Bombay Hawkers Union vs. Bombay Municipal Corporation (supra), the scheme framed by the Corporation was approved by the Court. Subsequently, in view of the directions given by the Supreme Court in Writ Petition No.656 of 1987 with other matters, a direction was issued by the Division Bench dated April 22, 1987. We have gone through the directions given by the Supreme Court in Special Leave to Appeal (Civil) Nos. 47 to 51, 1989 and 200 all of 1986 and Writ Pettions No. 1354, 859, 958, 511 all of 1986 with other mattrs and the decision of the Apex Court in Special Leave Petition No. 2296 to 2298 of 1986. IN Special Civil Application No. 6864 of 1987, the Court has also passed an order subsequently on 6.2.1988. We have also perused the decision delivered by the Division Bench in Spl.C.A. No. 2356 of 1980 and 4114 of 1980. In view of the scheme made by this Court and approved by

the Apex Court, and in view of the directions given by the Apex Court, it is very clear that near the garden, hawking is not permissible.

17. Final Plot NO.430 i.e. Law Garden area is also thickly populated over and above there is heavy flow of traffic. Citizens of Ahmedabad and AMC had tolerated heavy encroachments on the street for several years, it can be said. Photographs produced before us shows that there is hardly any larri and paved area was converted into platform of more than 1 to 2 ft. in height and pakka sheds are constructed. Refrigerator and other articles are seen lying under pakka iron sheds. The Apex Court, while dealing with the case of Indian Council for Enviro-Legal Action (supra), has observed as under:-

"26. Enactment of a law, but tolerating its infringement, is worse than not enacting a law at all. The continued infringement of law, over a period of time, is made possible by adoption of such means which are best known to the violators of law. Continued tolerance of such violations of law not only renders legal provisions nugatory but such tolerance by the enforcement authorities encourages lawlessness and adoption of means which cannot, or ought not to be tolerated in any civilized society. Law should not only be meant for the law-abiding but is meant to be obeyed by all for whom it has been enacted. A law is usually enacted because the legislature feels that it is necessary. It is with a view to protect and preserve the environment and save it for the future generations and to ensure good quality of life that Parliament enacted the anti-pollution laws, namely, the Water Act, Air Act and the Environment (Protection) Act,1986. These Acts and Rules framed and notification issued thereunder contain provisions which prohibit and/or regulate certain activities with a view to protect and preserve the environment. When a law is enacted containing some provisions which prohibit certain types of activities, then it is of utmost importance that such legal provisions are effectively enforced. If a law is enacted but is not being voluntarily obeyed, then it has to be enforced. Otherwise, infringement of law, which is actively or passively condoned for personal gain, will be encouraged which will in turn lead to a lawless society. Violation of anti-pollution laws not only adversely affects the existing quality of life but the

non-enforcement of the legal provisions often results in ecological imbaloance and degradation of environment, the adverse effect of which will have to be borne by the future generations."

18. The decision in the case of P.Vijaykumar (supra) would not help the petitioners which was shown to us as a last resort. It deals with Tamil Nadu District Municipal Committees Act. But after going through relevant sec.183 of the said Act reproduced in the said decision, in our opinion, the same cannot help the case of the petitioner and others. In a case before Madras High Court, there was no notice for removal of small shops given on rent-licence fees to the vendors There was clear violation of sub-sec.(6) of sec.83 of the said Act and sub-sec.(3) of sec.183 empowers the District Municipalities to part with the land which can be termed as road side land or street margins on licence. So removal of shops without notice to the persons who were given road side land under a Statute were suddenly removed, High Court interfered and restored the possession. Neither fact, nor law propounded by the aforesaid decision can help the case of the petitioner and others. In short, there is no merit in the petition and the same requires to be dismissed. Hence, Spl.C.A. No. 9843 of 2000 is dismissed. Rule is discharged. No costs.

19. So far as petition being Spl.C.A. No.8689/2000 is concerned, as aforesaid, though the prayer of the petitioner is for a direction to implement the scheme as aforesaid, indirectly it is prayed to restrain respondents from removing hawkers etc. doing business in hawking zone. It is not the case of the petitioner that though they are in hawking zone, they are being forcibly evicted. In view of the settled legal position considered and referred to by us in para-8(v) above along with other judicial pronouncements, prayers sought for in this petition cannot be granted. We agree that the petition is preferred by the petitioner in the capacity of Genral Secretary of the Association, but as observed above, in view of settled legal position propounded in various decisions of the different High Courts as well as Apex Court which have been considered and referred to by us, the only direction which can be given by this Court is that hawker and/or pitch vendor shall individually as a member of the Association, make application before the appropriate authority, if he so desires, for appropriate relief and/or for alternative place convenient to the Corporation in the hawking zone. It is further observed that if such an application is made, the same shall be decided on merits and in accordance with law. Hence,

this petition is also dismissed on the same reasons.
Rule is discharged.

13-12-2000 [B.C. PATEL, J]

[C.K. BUCH, J]
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